

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 3:98CR241(CFD)
	:	
BENJAMIN COOK	:	

RULING

On December 8, 1998, an indictment was returned against the defendant, Benjamin Cook, and twelve other individuals charging a heroin distribution conspiracy and related counts. Mr. Cook was indicted on two counts. Count One charged him with conspiracy to possess with the intent to distribute and to distribute one kilogram or more of heroin in violation of 21 U.S.C. § 841(a)(1) and § 846. Count Eighteen charged him with possession with the intent to distribute a quantity of heroin in violation of 21 U.S.C. § 841(a)(1). On February 2, 2000, after a four-day trial, a jury convicted Mr. Cook of both counts. Pending before this Court is the Defendant's Renewed Motion for a New Trial [Doc. # 550].¹

The defendant argues that he should be granted a new trial at which the amount of drugs for which he should be held responsible is determined by a jury. He contends that such a determination is necessary in light of the United State Supreme Court's ruling in Apprendi v. New Jersey, which was decided while he was awaiting sentencing. See 120 S. Ct. 2348 (2000). The government argues that the holding of Apprendi does not require that a new trial be conducted, so

¹The first motion for a new trial was denied on May 9, 2000, but it did not raise the issue here.

long as his sentence does not exceed the statutory maximum for incarceration set forth at 21 U.S.C. § 841(b)(1)(C) of twenty years.

For the following reasons, the defendant's motion is DENIED.

Discussion

Under Apprendi, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 120 S. Ct. at 2362. Referring to statutes that allow courts to make factual findings applicable to sentencing by a preponderance of the evidence, the Supreme Court concluded, “[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” Id. at 2362 (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)). Although the Court of Appeals for the Second Circuit has yet to address the issue, several circuits, following Apprendi, have concluded that courts may still find facts relevant to sentencing by a preponderance of the evidence, but those findings may not result in a sentence greater than the maximum statutory penalty for the offense established by the jury verdict. See e.g., United States v. Angle, 230 F.3d 113, 123 (4th Cir. 2000); United States v. Doggett, 230 F.3d 160, 166 (5th Cir. 2000); United States v. Keith, 230 F.3d 784, 787 (5th Cir. 2000); United States v. Aguayo-Delgado, 220 F.3d 926, 933-34 (8th Cir. 2000).

In his renewed motion for a new trial, the defendant seeks to apply “an extension” of Apprendi and its progeny to his convictions under § 841(a)(1) and § 846. The statutory penalties for drug offenses under these sections, as set forth in § 841(b), depend on the type and quantity of

drug involved in the offense. A defendant found guilty of an offense involving one kilogram or more of heroin is subject to a statutory maximum of life in prison under § 841(b)(1)(A). If the offense involves 100 grams or more of heroin, the defendant is subject to a statutory maximum of 40 years imprisonment under § 841(b)(1)(B). Finally, if the offense involves any quantity of heroin, the defendant is subject to a statutory maximum of 20 years imprisonment under § 841(b)(1)(C).

In Mr. Cook's case, Count One of the indictment charged a specific quantity of heroin, one kilogram or more, while Count Eighteen charged only an unspecified quantity of the drug. The jury, however, was instructed with respect to both counts that it was not required to find Mr. Cook guilty of an offense involving any particular quantity of heroin beyond a reasonable doubt; the jury was instructed that it need only conclude that an unspecified quantity of heroin was involved for each count. As a result, the jury did not conclude that a particular quantity of heroin was involved as to either count. The defendant contends that under Apprendi, this court may not make factual findings relating to drug quantity at sentencing, regardless of whether such findings affect the statutory maximum. He further argues that such findings also would impermissibly increase the statutory mandatory minimum penalty applicable to Mr. Cook. As a result, the defendant argues that Apprendi requires a jury to determine beyond a reasonable doubt the quantity of heroin attributable to Cook under both counts of conviction, if quantity is to be considered for these purposes.

As mentioned, the Second Circuit has yet to apply Apprendi to the penalty provisions of § 841(b)(1) in a case where a jury did not find beyond a reasonable doubt that a certain amount of

drugs is attributable to the defendant. See United States v. Champion, 234 F.3d 106, 109 (2d Cir. 2000) (“Though the question of whether, after Apprendi, a judge’s fact findings that create a higher mandatory minimum violate a defendant’s right to jury trial is an open one in this circuit, that question is not before us.”). The other circuits who have addressed the issue have concluded that fact finding by the court concerning drug quantity at sentencing will not conflict with Apprendi as long as it results in a sentence within the § 841(b)(1)(C) maximum of twenty years. See Angle, 230 F.3d at 123; Doggett, 230 F.3d at 165-66; Keith, 230 F.3d at 787; United States v. Sheppard, 219 F.3d 766, 768 (8th Cir. 2000); Aguayo-Delgado, 220 F.3d at 933-34; United States v. Gerrow, 232 F.3d 831, 834 (11th Cir. 2000).

The opinions from the other circuits point out that the statutory maximum under § 841(b)(1)(C) applies regardless of the quantity of drugs involved in the offense. See, e.g., Angle, 230 F.3d at 122-23. In contrast, under § 841(b)(1)(A) or § 841(b)(1)(B), the statutory maximum is tied to the quantity of drugs attributable to the defendant.² See id. at 123. Thus, when a jury does not make any finding as to quantity, like here, the twenty year limit of § 841(b)(1)(C) must apply under Apprendi. Otherwise, a judge’s determination at sentencing that a defendant possessed an amount of drugs sufficient to subject him to conviction under § 841(b)(1)(A) or § 841(b)(1)(B) would be a factual finding which would increase the maximum penalty from 20

²Before Apprendi, it was clear in this circuit that drug quantity was not an element of the offense under § 841, but instead was a sentencing factor to be determined by the judge by a preponderance of the evidence. See United States v. Thomas, 204 F.3d 381 (2d Cir.), vacated and remanded, 2001 WL 12399, No. 99-9541 (U.S. Jan. 8, 2000) (remanding the case for further consideration in light of Apprendi). The Second Circuit as yet has not determined whether this principle is still true after Apprendi, but for the purposes of sentencing Mr. Cook, this Court will assume that quantity should be treated as an element of the offense.

years under § 841(b)(1)(C), to 40 years under § 841(b)(1)(B), or to life under § 841(b)(1)(A). See Doggett, 230 F.3d at 164-65. Conversely, when a court's factual findings as to quantity or other matters results in a sentence at or below the sentencing maximum of § 841(b)(1)(C) of twenty years, they are not facts that increase the defendant's penalty beyond the statutory maximum, and thus need not be charged in the indictment and proved to a jury beyond a reasonable doubt. See id. at 166. Thus, "where the quantity is not charged, the drug amount is still a proper aggravating or mitigating factor to be considered by the judge in determining a sentence at or below the statutory maximum sentence." Angle, 230 F.3d at 123.

This Court agrees with the reasoning of the circuits which have considered this issue. With respect to Mr. Cook, although a specific quantity of heroin was charged in Count One of the indictment (one kilogram or more), the jury did not find him guilty of an offense involving any amount of heroin other than a "detectable amount." So, too, with Count Eighteen. Therefore, under Apprendi, the jury's verdict authorizes only a sentence at or below the prescribed statutory maximum of 20 years set forth in § 841(b)(1)(C) for each. Accordingly, in sentencing Mr. Cook, this Court will not exceed this limit, and the judgment will reflect that Mr. Cook will have been sentenced under § 841(b)(1)(C) for both Count One and Count Eighteen.³ As a result, it is unnecessary to hold a new trial to allow a jury to determine the quantity of heroin that might be attributed to him. The Court is also free to make findings as to drug quantity that are relevant to the defendant's sentence below the twenty-year statutory maximum.

³Mr. Cook also will be sentenced without regard for any mandatory minimum penalty, as none applies to § 841(b)(1)(C).

For the foregoing reasons, the defendant's renewed motion for a new trial [Doc. # 550] is
DENIED.

SO ORDERED this 26th day of January, 2001, at Hartford, Connecticut.

/s/
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE